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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1041

DI VOSTA RENTALS, INC.,
Petitioner,

vs.

EMMETT C. LEE, JR., COLONEL, CORPS OF ENGINEERS, DISTRICT ENGINEER, DEPARTMENT OF THE ARMY, JACKSONVILLE, FLORIDA DISTRICT; HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your Petitioner, DI VOSTA RENTALS, INC., hereby petitions your Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment, decision and opinion in the case of DI VOSTA RENTALS, INC., Plaintiff-Appellee, vs. EMMETT C. LEE, JUNIOR, COLONEL, CORPS OF

ENGINEERS, et al., Defendants-Appellants, Case Number 73-1893, reversing and remanding final judgment entered for Petitioner by the United States District Court in and for the Southern District of Florida.

I

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit denying the Petition for rehearing filed by the Petitioner is unreported to date (Appendix A to Petition). The opinion and judgment of the United States Court of Appeals for the Fifth Circuit reversing and remanding the final judgment entered for the Petitioner by the District Court is unreported to date (Appendix B to Petition). The final judgment entered in favor of the Petitioner by the United States District Court in and for the Southern District of Florida is unreported (Appendix C to Petition).

II

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit denying the Petition for rehearing was entered on December 4, 1973 (Appendix A to Petition). The decision sought to be reviewed in this case was entered by the United States Court of Appeals for the Fifth Circuit on November 14, 1973 (Appendix B to Petition). This Petition for Certiorari is filed within 90 days from the date of the denial of the Petition for rehearing. The jurisdiction of this Court is invoked under U.S. Sup. Ct. Rule 19, §1(b), 28 U.S.C.A.; and 28 U.S.C.A., §1254(1) and 2101(c).

III

QUESTION PRESENTED

Whether Respondent's denial of a fill permit purportedly based on ecological grounds was arbitrary and capricious when the record before Respondent did not show factually substantial ecological reasons to support such denial.

IV

STATUTES INVOLVED

33 U.S.C.A. §403

§403.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

16 U.S.C.A. §661-666(c)

§661.

". . . wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation. . . ."

§662.

"(a) . . . such department or agency first shall consult with the United States Fish and Wildlife Service, Department of Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State . . . with a view to the conservation of wildlife resources. . . ."

"(b) . . . recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. . . ."

42 U.S.C.A. §4331-4347

§4331.

"(a) . . . It is the continuing policy of the Federal government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in

a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans."

§4332.

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Chapter, and (2) all agencies of the Federal government shall—(A) utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment . . .; (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official. . . ."

V

STATEMENT OF THE CASE

The Petitioner was the Plaintiff at the District Court level and the Appellee before the United States Court of Appeals for the Fifth Circuit. The Respondents were the Defendants at the District Court level and the Appellants before the United States Court of Appeals for the Fifth Circuit. Essentially all of the record in the trial court reviewed by the United States Court of Appeals for the Fifth Circuit was contained in the Appendix filed in that

Court by the Appellants. Reference to the trial court record which was the record reviewed on Appeal will be by use of the symbol "App.".

The parties will be referred to in the positions they occupy before this Court and in their proper name.

The parties in the trial court proceedings entered into a stipulation in lieu of presenting testimony at the trial court level and this stipulation, together with the documents it referred to, constituted the record in this case (App. 153).

The stipulated facts were as follows:

The nature of this cause is an action to compel the Respondents to grant a fill permit to fill certain submerged lands, after denial of such fill permit by the Respondents.

Petitioner is a corporation organized under the laws of the State of Florida. Emmett C. Lee, Jr. is District Engineer of the Corps of Engineers, Department of the Army, Jacksonville, Florida District. Stanley R. Resor is Secretary of the Army. These Respondents are sometimes hereinafter called the "Corps".

On February 3, 1967, Petitioner acquired title to a parcel of land fronting on Lake Worth, which will hereafter be referred to as the "upland". As of that time and at all times since, there existed a bulkhead line in the waters of Lake Worth opposite the uplands. This bulkhead line was established by the City of West Palm Beach on September 23, 1963 and approved by the Trustees of the Internal Improvement Trust Fund of the State of Florida on January 10, 1964.

On April 25, 1967, Petitioner, as an upland owner, applied to said Trustees to purchase the submerged land be-

tween the upland and the bulkhead line. This tract is the submerged lands involved in this litigation.

The appraisal obtained by the Trustees calculated the value of the land, if filled and bulkheaded, and deducted therefrom costs of bulkhead and fill. Without filling the property, the property has no practicable use or value.

On September 3, 1969, Petitioner applied to the Trustees for a fill permit in order to fill the above described submerged lands. According to its application, no dredging would occur and all fill material was to be hauled in.

On October 21, 1969, the Trustees declined to approve the fill permit previously approved by the City of West Palm Beach, Florida.

The Petitioner then instituted an action in the Circuit Court in and for Leon County, Florida, in order to compel the issuance of subject fill permit. On May 5, 1970, the Circuit Court of Leon County entered its judgment requiring said fill permit to be issued by the Trustees to the Petitioner.

On July 23, 1970, the Petitioner, in fact, did receive the fill permit from the State of Florida Board of Trustees of the Internal Improvement Trust Fund. Before agreeing to sell the subject submerged lands to the Petitioner, the Trustees employed a marine biologist to make a biological or environmental study of the submerged lands. The results of that study showed that the subject area has been adversely affected by previous development work in the vicinity. The adjacent parcel to the south has been filled. The bottom in the subject area consists of sand and silt and is not vegetated. Sale and subsequent development of this parcel should not have significant adverse effects on the marine life of the area.

This study was concluded on March 19, 1969, and there have been no changes in the condition of the property to the present date.

Subsequent to obtaining the fill permit from the Trustees, the Petitioner applied to the Corps for a fill permit. This fill permit was denied by the Corps on April 19, 1972. The reasons stated by the Corps for denying the permit are as follows:

1. Is not believed to be consistent with current public interest in the preservation of man's natural environment as enunciated in Public Law 91-190.

2. Would not involve a water-dependent development.

3. Is opposed by the Department of the Interior and the Environmental Protection Agency and was approved by the Board of Trustees of the Internal Improvement Trust Fund only after an order from circuit court.

Subject real property is zoned by the City of West Palm Beach for multi-story apartment buildings. Petitioner intends to erect an apartment building in conformity with the zoning and building ordinances of the City of West Palm Beach, Florida. If such occurs, there is no anticipated interference with navigation. The apparent objections made by the Department of the Interior and the Environmental Protection Agency, while conceding that there is no vegetation in the submerged lands to be filled, nevertheless, at some point in the future, means might be found to restore Lake Worth to a more valuable estuarine area and to bring up the water quality. Further, the Environmental Protection Agency pointed out that because there is no vegetation, it does not necessarily follow

that it is without value to the Marine Ecosystem since much of Lake Worth is presently without vegetation and yet supports a valuable sport fishery and organisms valuable to the fish food chain. Therefore, no further fill should be allowed in Lake Worth for the intended uses to be made by the Petitioner. There is no present plan of reclamation of Lake Worth, nor are there currently any reasonable technological bases for such reclamation.

These agencies also conclude that the installation of an apartment complex on the subject property would necessitate an overloading of the inadequate sewage treatment facility of West Palm Beach, Florida. At all times material to the litigation and to the present date, the City of West Palm Beach has not declared a moratorium on the issue of building permits for any reason, including inadequate sewage facilities. Disposition of sewage through the sewage system of West Palm Beach would be in the same manner on the subject submerged lands, if filled, as would be the case by virtue of the buildings on upland and interior real estate located within the corporate limits of the City of West Palm Beach, Florida.

The City of West Palm Beach has directed its legal Department to investigate the possibility of obtaining certain right of way necessary to the reconstruction and widening of part of Flagler Drive to extend south from Okeechobee Boulevard approximately 1,200 feet. City engineers have prepared a survey showing an intended acquisition by the City of West Palm Beach from the Petitioner of a certain portion of the submerged lands consisting of approximately the westerly 30′ of the subject submerged lands. The City would fill this portion of the submerged lands in any event if acquired by the City either by donation by the Petitioner, or by condemnation

by the City, if necessary. Therefore, it is likely that a portion of the submerged lands will be filled, pursuant to the needs and desires of the City of West Palm Beach. The City of West Palm Beach would have to obtain approval of the Corps for such fill.

The fill permit sought by the Petitioner, prior to the time it was submitted to the Corps, was approved by all pertinent municipal and state governmental agencies, except the Trustees, which resulted in the litigation in Leon County Circuit Court. Said agencies include the City of West Palm Beach, the Area Planning Board, the Central and Southern Flood Control District; and the Air and Water Pollution Control Department of the State of Florida, which issued its determination stating that filling the subject property would not violate applicable water quality standards of the State of Florida. This determination was issued September 18, 1970 (App. 153-157).

Thereafter, Petitioner filed litigation in the United States District Court for the Southern District of Florida on May 25, 1972, seeking the relief prayed for in the Complaint, i.e., issuance of the necessary fill permit to fill the subject submerged lands. The District Court, on March 16, 1973, entered a final judgment ordering the Respondents to issue the fill permit (Appendix C to Petition).

The United States Court of Appeals for the Fifth Circuit on November 14, 1973, reversed the final judgment of the District Court and remanded the cause to said District Court to dismiss the cause to the prejudice of Petitioner and in favor of Respondents (Appendix B to Petition) and on December 4, 1973, denied the Petition for rehearing filed by the Petitioner (Appendix A to Petition).

VI

POINT RELIED ON FOR ALLOWANCE OF THE WRIT

POINT

The question involved is an important issue of Federal law, which has not been, but should be settled by this Court.

VII

ARGUMENT

The parties agreed that granting the fill permit would not interfere with navigation. Prior to the decision of *Zabel* v. *Tabb*, 430 F.2d 199 (1970), cert. den., 401 U.S. 910, the state of the law relative to fill permits seemed to be that where the Secretary of the Army finds that proposed construction would not interfere with navigation, then a fill permit must be granted. See *Zabel* v. *Tabb*, 296 F.Supp. 764 (1969), wherein the Federal District Court held this to be the law in interpreting the Rivers and Harbors Appropriation Act of 1899, §10, 33 U.S.C.A. §403, and the Fish and Wildlife Coordination Act §2 as amended 16 U.S.C.A. §662. However, when the *Zabel* case was decided by the Fifth Circuit Court of Appeals in July of 1970, it expanded court decisions in this field. Indeed, the Chief Judge stated at the beginning of his opinion, as reported in 430 F.2d 199, at page 200 as follows:

> "It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance. So it is here as we enter in depth the contemporary interest in the preservation of our environment."

At page 203 of the *Zabel* opinion, the Court clearly stated the issue before it as follows:

> "The question presented to us is whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for *factually substantial ecological reasons* even though the project would not interfere with navigation, flood control, or the production of power."

The essence of the Court's decision in *Zabel* is that the Secretary of the Army may withhold approval of a fill permit for factually substantial ecological reasons.

There is not an iota, a scintilla or a thread of proper evidence in this cause to conclude that granting Petitioner's fill permit application would cause substantial ecological damage.

Webster's New Twentieth Century Dictionary of the English Language, Unabridged Second Edition, defines ecology as the branch of biology that deals with the relations between living organisms and their environment. The bottom of the submerged land the Petitioner seeks to fill consists of sand and silt and is not vegetated. The marine biologist employed by the Trustees of the Internal Improvement Trust Fund concluded that the sale and subsequent development of this parcel should not have significant adverse effects on the marine life of the area. Such is the condition of the property as of the present date. Respondents have not shown any harm to even one fish or crustacean, let alone substantial damage to marine life. There is no present plan of reclamation of Lake Worth, nor are there any technological bases for such reclamation. The Respondent's conclusion that allowing fill of the subject submerged land would not allow restoration of subject bottomland in the future can be said about any parcel of

submerged land. If such a declaration would constitute legal grounds for denial of a fill permit, then the administrative agencies' powers have been so broadened as to close judicial review of any kind in this type of case.

In the report on Petitioner's application for a fill permit by Colonel A. S. Fullerton, then District Engineer, Corps of Enginers in Jacksonville, made on February 2, 1972 (App. 136-139), he notes, among other things, the following:

(1) No dredging will be involved as the fill material will be hauled in.

(2) There would be no unreasonable obstruction to navigation.

(3) No adverse effect anticipated as to flood heights and drifts.

(4) Beach erosion and accretion are not applicable.

(5) There are no objections to the proposed work from the standpoint of pollution.

(6) As to aesthetics, the applicant maintains that aesthetics will be improved by the fill and bulkhead since the area now serves to attract debris. Objectors argue that the present water is more attractive than a filled area with a multi-story building on it.

(7) As to ecology, no cited ecological harm is noted, except that the objections of Fish and Wildlife Service and the Environmental Protection Agency are based primarily on ecological considerations.

(8) Little public interest has been shown. There were two letters and a petition with 10 names against the proposed work and letters from two property owners in favor.

Finally, Colonel Fullerton concludes in his recommendations, two reasons why the application should be denied. He states that in spite of the arguments presented by the developers, many of which contained considerable validity and although the proposed work is relatively minor in scope, it is not considered water-dependent or believed to be consistent with current public interest in preservation of man's natural environment as enunciated in Public Law 91-190. Secondly, he states that the work was approved by the Trustees of the Internal Improvement Trust Fund only after an order from Circuit Court and is opposed by the Department of the Interior and the Environmental Protection Agency.

These recommendations were the bases upon which the Petitioner's application was denied (App. 141).

No substantiation for these reasons being a proper basis for denial of the Petitioner's fill permit can be found in case law. Whether a project is or is not water-dependent (whatever that may be) has not been cited as a criteria for the approval or disapproval of a fill permit. Whether a project is consistent with current public interest fits into the same category as whether a project is a water-dependent development. If such are to become law, it must be done by an Act of Congress or by appropriate case decision, and not by an administrative regulation or pronouncement.

The Respondents would adopt the reasoning of the Department of the Interior and the Environmental Protection Agency as constituting ecological reasons for the denial of Petitioner's application. The stipulation of facts agreed upon by the parties contains the following:

> ". . . The apparent objections made by the Department of the Interior and the Environmental Protection Agency, while conceding that there is no vegetation

in the submerged lands to be filled, nevertheless, at some point in the future, means might be found to restore Lake Worth to a more valuable estuarine area and to bring up the water quality. Further the Environmental Protection Agency pointed out that because there is no vegetation, it does not necessarily follow that it is without value to the Marine Ecosystem since much of Lake Worth is presently without vegetation and yet supports a valuable sport fishery and organisms valuable to the fish food chain. Therefore, no further fill should be allowed in Lake Worth for the intended uses to be made by the Petitioner. There is no present plan of reclamation of Lake Worth, nor *are there currently* any reasonable technological bases for such reclamation."

"These agencies also conclude that the installation of an apartment complex on the subject property would necessitate an overloading of the inadequate sewage treatment facility at West Palm Beach, Florida. At all times material to the litigation and to the present date, the City of West Palm Beach has not declared a moratorium on the issue of building permits for any reason, including inadequate sewage facilities. Disposition of sewage through the sewage system of West Palm Beach would be in the same manner on the subject submerged lands, if filled, as would be the case by virtue of the buildings on upland and interior real estate located within the corporate limits of the City of West Palm Beach, Florida." (App. 156).

All of the government's exhibits do not enlarge the stipulation, and the ecological damage must be derived from the above facts as stated. The best that can be said for the evidence of the Respondents as above stated, is that it is speculative and in part devoid of logic.

Certainly, it does not constitute evidence of factual ecological damage that will occur if the Petitioner does, in fact, fill the subject submerged land. The point that allowing fill now would mean that there would be less submerged land to restore in the future, if the future brought about means of restoration, is pure speculation.

The second point raised in the above evidence, by way of stipulation, is that the Environmental Protection Agency points out that because there is no vegetation, it does not necessarily follow that it is without value to the Marine Ecosystem since much of Lake Worth is presently without vegetation and yet supports a valuable sport fishery and organisms valuable to the fish food chain, is sheer speculation by mere reading of the language. While it does not necessarily follow that it is without value to the Marine Ecosystem, it does necessarily follow that it is with value to the Marine Ecosystem.

The Respondents and their agencies, pointing out that installation of an apartment complex on the subject property would necessitate an overloading of the inadequate sewage treatment facility at West Palm Beach, Florida, was obviated for two reasons. First, they produced no evidence that such was the case. Secondly, the above evidence, by way of stipulation, shows that at all times material to this litigation and to the present date, the City of West Palm Beach has not declared a moratorium on the issue of building permits for any reason, including inadequate sewage facilities. Disposition of sewage through the sewage system of West Palm Beach would be in the same manner on the subject submerged lands, if filled, as would be the case by virtue of the buildings on the upland and interior real estate located within the corporate limits of the City of West Palm Beach, Florida.

The only reason for denial of the permit was best stated by the State Court on page 9 of its opinion (App. 56) as follows:

> "The Court cannot close its eyes to the obvious. The minutes of the Trustees show conclusively that it is not the proposed filling that influenced the Trustees to disapprove the fill permit. It was the objection of interested citizens to the proposed construction of a high-rise apartment house on this land when filled. . ."
>
> "The law vests the zoning of property in local authorities. It does not vest that power in the Trustees."

Likewise, it is submitted that there is no authority that the federal government has now undertaken the massive burden of zoning property in municipalities throughout the country. It would appear that the federal government has enough tasks already, without asking for this further problem. If the issue to be decided in this type of case is whether a particular judge or jury is fond, or not fond, of apartment buildings, then a landowner is left without judicial review or relief of any kind. While *Zabel* expanded the law, it only did so within the terms of that decision and it cannot be seriously argued that the aesthetics or lack of aesthetics of an apartment building are the issues to be tried in a case such as this.

As to aesthetics, the trier of fact determined that the area in question is a catchall for refuse, dead fish, tin cans and general debris, and is generally an eye-sore area (App. 185).

The evidence is not only devoid of ecological harm that will occur if Petitioner's application is granted, but it affirmatively shows that there will be no ecological damage.

The Federal District Court Judge not only found that no substantial evidence of ecological detriment to the affected land was presented, but further found that credible evidence exists that there would be no such detriment (App. 188).

The opinion by the Fifth Circuit Court of Appeals decided the standard of review to be employed by the Courts in reviewing Respondent's decision to grant or deny a fill permit. Conceding that the standard of review is the arbitrary and capricious test, nevertheless, whatever standard is employed, to substantiate Respondent's denial of the subject fill permit, there must be evidence before the Respondents showing factually substantial ecological reasons to support their actions in denying the subject fill permit. Mere objections, or opinions not based upon factual data as exemplified by the record in this case, do not constitute grounds for denial within the conceded standard of review. For example, it is impossible to refute an opinion that any further fill of Lake Worth would result in ecological damage. The evidence before the Respondents was to the contrary.

In the decision of the Fifth Circuit Court of Appeals, the Court cites the Federal Water Quality Administration wherein there are objections to the project because it consists of destruction of a natural shoreline and shallow water areas. The record refutes this (App. 106) wherein it can readily be determined that substantially all of the downtown area of West Palm Beach depicted by way of photograph is bulkheaded and there is very little natural shoreline. The area sought to be filled is a part of a small area as shown in the photograph that presently does have an unbulkheaded shoreline, but it is certainly not a natural shoreline as more readily determined from other photographs in the record (App. 105) where the shoreline of

this subject property is shown to consist of rock commonly referred to as rip-rap. As to water quality standards, the record shows that the State of Florida, Department of Air and Water Pollution Control, certified that the subject project will be executed in a manner which will not violate applicable water quality standards of the State of Florida (App. 59).

Careful analysis of the record shows that there is no evidence based upon any relevant standard of review to support a conclusion that there are factually substantial ecological reasons for denial of the fill permit.

The decision reached by the Fifth Circuit concluded that the "substantial evidence test" was not the proper standard of review, and therefore, inferred that the record would not have to reveal factually substantial ecological reasons as grounds for denial. The method of standard of review is separable from the conclusion that any reviewer must reach according to the Fifth Circuit's own decision in *Zabel*, supra. If mere objections by Federal agencies in the form of opinion unsupported by factual data are sufficient to support denial of a fill permit, then the law should be enunciated clearly to that effect which as a practical matter would result in no judicial review whatsoever. It is submitted that this Court should enunciate with clarity just what issues are involved in addition to the standard of review to be employed by the Courts.

VIII

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review and reverse or quash the judgment, decision and opinion of the United States Court of Appeals for the Fifth Circuit on the grounds so stated in the Petition.

Respectfully submitted,

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IX

CERTIFICATE OF SERVICE

I, JAMES E. WEBER, ESQUIRE, a member of the Bar of the Supreme Court of the United States, representing the Petitioner herein, hereby certify that three copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix were mailed this 1st day of March, 1974, to LAWRENCE E. SHEARER, Attorney for Respondents, Department of Justice, Washington, D.C. 20530 and the SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

JAMES E. WEBER, ESQUIRE
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APPENDIX

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 73-1893

DI VOSTA RENTALS, INC.,
Plaintiff-Appellee,

versus

EMMETT C. LEE, JR., Colonel,
Corps of Engineers, Etc., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

On Petition for Rehearing

(December 4, 1973)

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 73-1893

DI VOSTA RENTALS, INC.,
Plaintiff-Appellee,

versus

EMMETT C. LEE, JR., Colonel,
Corps of Engineers, Etc., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(November 14, 1973)

Before GEWIN, AINSWORTH and MORGAN,
Circuit Judges

MORGAN, Circuit Judge: The question presented to us for review in this case is whether the district court erred in ordering the Secretary of the Army to issue a permit to fill navigable waters to Di Vosta Rentals, Inc. (hereinafter referred to as Di Vosta). To answer the question, we must examine the scope of authority granted to the Secretary by §10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403,[1] and the scope of review which the

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1. 33 U.S.C. §403 provides:

§403.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier,

(Continued on following page)

district court should have used to test the validity of the Secretary's refusal to issue a permit. After receiving stipulated evidence and trial briefs from the parties, the district court ordered defendants to issue a permit to the plaintiff. We reverse.

I

On February 3, 1967, Di Vosta acquired title to a parcel of land fronting on Lake Worth, Florida. On September 10, 1969, having paid $18,221 to the Trustees of the Internal Improvement Trust Fund of the State of Florida, Di Vosta acquired title to .614 acres of submerged land adjoining its likeside property. Di Vosta's purpose, which did not become known to the government agencies involved until much later, was to build an apartment building on the property. To make the land suitable for this project, Di Vosta had to obtain fill permits for the submerged land from both the state and federal governments. Di Vosta first applied to the Trustees for a permit. They refused. Di Vosta successfully sued in the state courts of Florida to compel issuance of the permit, which was issued July 23, 1970.

Di Vosta applied to the Corps of Engineers for a dredge and fill permit on July 31, 1970. After distributing public

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Footnote continued—

dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

notice of the request, the Corps received objections from private citizens, the Palm Beach County Board of County Commissioners and several federal agencies.

The Corps informed Di Vosta of the objections and offered the opportunity to present arguments in support of the project. Di Vosta did so in late January, 1971. This information was sent to the objecting federal agencies, and in March, the Corps was informed that these agencies remained opposed to the permit. Negotiations continued throughout 1971, but all parties held staunchly to their positions. The District Engineer informed Di Vosta on April 19, 1972, that its application for a permit had been denied because the permit:

1. Is not believed to be consistent with current public interest in the preservation of man's natural environment as enunciated in Public Law 91-190,
2. Would not involve a water-dependent development, and
3. Is opposed by the Department of the Interior and the Environmental Protection Agency and was approved by the Board of Trustees of the Internal Improvement Trust Fund only after an order from circuit court.

Di Vosta filed suit in district court on May 25, 1972, and the court entered its final judgment March 16, 1973, requiring the federal defendants to issue the fill permit to Di Vosta. The defendants filed a notice of appeal April 19, 1973.

II

The Secretary's decision to deny the permit must be examined in relation to the applicable institutional frame-

work. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, is a total ban on all obstructions of navigable waters, subject only to exceptions specifically authorized by the Secretary of the Army. The Act allows the Secretary wide discretion in deciding whether to issue a permit. In fact, it places no restrictions on the decision at all. Nevertheless, the authority of the Secretary to grant or deny permits is not unlimited. His decision may be reviewed by a court. 5 U.S.C. §706. *Zabel* v. *Tabb* (5 Cir. 1970) 430 F.2d 199, cert. denied, 401 U.S. 910 (1971). See, *Association of Data Processing Service Organization, Inc.* v. *Camp*, 397 U.S. 150, 156-57 (1970).

A reviewing court is limited in its review of an agency decision, however. Its function is not to determine the *correctness*, in some ultimate sense, of an agency's actions. A reviewing court is limited to determining only the *legality* of the challenged action. If an agency acts within the scope of its authority, and if that authority is consistent with the Constitution, then a court may not overturn the agency's decision. *St. Joseph Stock Yards Company* v. *United States*, 298 U.S. 38, 51 (1936).

In §10, Congress has left certain decisions within the discretion of the Secretary of the Army. A court may review the legality of the Secretary's exercise of discretion, *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 108 (1902), but may not substitute its judgment for that of the Secretary. *Federal Reserve System* v. *Agnew*, 329 U.S. 441, 444 (1947).

Congress has codified the rules which control court review of agency action. In the Administrative Procedure Act, 5 U.S.C. §§701, *et seq.*, Congress set forth specific guidelines which courts are obliged to use in reviewing agency decisions. The primary question before this court is one of the applicability of the various subsections of 5

U.S.C. §706,[2] setting standards for the judicial review of administrative action.

The district court held 5 U.S.C. §706(2)(E) to be applicable to the Secretary's decision to refuse a permit. That section allows a court to set aside agency action found to be "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute. . . ."

The defendants argue that subsection (E) is not applicable because the proceedings herein do not fall into either of the two categories of that subsection. They

---

2. 5 U.S.C. §706 provides:

§706.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

further argue that the only relevant subsection of §706(2) is §706(2)(A), providing that agency action may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

Defendants' position is unexceptionable. At no time has Di Vosta argued that the Secretary's actions fall into either of the two categories of subsection (E), proceedings under 5 U.S.C. §§556 and 557, or decisions "otherwise reviewed on the record of an agency hearing provided by statute." Actions which do not fall within either of these categories are not subject to the "substantial evidence" test. *Camp* v. *Pitts*, 36 L.Ed.2d 106, 111 (1973).

Di Vosta's citation of *General Motors Corporation* v. *United States*, (6 Cir. 1963) 324 F.2d 604, is unavailing, since that case involved a tariff-setting proceeding before the Interstate Commerce Commission. The *G.M.* case was based on the landmark case of *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474 (1951). Concededly, proceedings before both the I.C.C. and the N.L.R.B. are subject to the "substantial evidence" requirement. But decisions of the Secretary of the Army under 33 U.S.C. §403 are not.

Di Vosta argues that the following language in *Zabel* v. *Tabb*, *supra*, indicates that the Secretary's decision is subject to "substantial evidence" review.

> The question presented to us is whether the Secretary of the Army can refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or the production of power. 430 F.2d at 203.

The question of the proper standard of review was not before the court in *Zabel*. The only question presented

was whether the Secretary could consider ecological factors in making his decision on the granting of a permit. *Id.* The court answered this question in the affirmative. The *Zabel* opinion cannot be read to include any holding with respect to the proper *scope* of judicial review of the Secretary's decision.

Di Vosta also argues that by submitting the case to the district court on stipulated evidence, the defendants agreed to *de novo* review of the Secretary's decision. This contention is totally without merit. Parties may not agree to expand the jurisdiction of the federal courts. *American Fire & Casualty Company* v. *Finn*, 341 U.S. 6 (1951).

III

Under different circumstances, it might be advisable to end the opinion at this point and simply remand the case to the district court for a determination of the issue of whether the Secretary's action in denying the permit was "arbitrary and capricious" within the meaning of 5 U.S.C. §706(2)(A). We feel, however, that additional litigation in the district court would be a waste of resources for all concerned. This case was submitted to the district court on stipulated documentary evidence and written trial briefs. Although this circumstance does not change this court's scope of review, it does affect our disposition of the case. For the reasons explained below, we are convinced that the Secretary's action was not arbitrary or capricious. Believing that nothing that might happen in the district court on remand could change our view of the case, we reverse, not for further proceedings not inconsistent with this opinion, but with directions to dismiss the complaint. Because we are making a final disposition of this case in this opinion, it is necessary to deal with several other points raised by the parties.

IV

Appellants point out that the United States has been included as a defendant in this case, and that this inclusion is improper under the doctrine of sovereign immunity. *Dugan* v. *Rank*, 372 U.S. 609 (1963). Di Vosta fails to present any argument or authority to the contrary. It is well established that the United States may not be made a defendant without its consent. There is no consent here. Therefore, the district court had no jurisdiction to bind the United States in its decree. *Cohens* v. *Virginia*, 6 Wheat. (19 U.S.) 264, 411-12 (1821).

V

Di Vosta appears to argue that the Secretary improperly considered objections from other government agencies in making his decision on a permit. Although Di Vosta's brief is not as lucid as it might be, this argument is apparently based on two grounds: the objections of other agencies were too vague to allow Di Vosta to respond properly and the receipt of written objections from other agencies violates the hearsay rule. Both of these arguments are without merit. An examination of the record reveals that the objections from other agencies were put in terms sufficiently explicit to give Di Vosta an opportunity to try to refute them. At every turn, Di Vosta was given sufficient opportunity to communicate with these agencies in an effort to change their recommendations. In no respect can Di Vosta be said to have been deprived of its right to due process of law. As to the apparent hearsay objection raised in Di Vosta's brief, we have been cited to no case which holds that in a proceeding such as this, the Secretary is to be held to the rigid formalities of the hearsay rule. Nor do we think such a citation exists.

VI

Having determined that the proper standard for review of the Secretary's decision is whether it was arbitrary or capricious, we turn to a review of the record. This review domonstrates that the Secretary's action may not be set aside under 5 U.S.C. §706(2)(A).

After receiving Di Vosta's application for a permit, the Corps made a public announcement of the application. This it was required to do by 33 C.F.R. §209.120(f)(1). Several replies indicated no objection to the project. But the opinion was not unanimous.

Three bureaus of the Department of the Interior opposed the permit application. The Bureau of Sport Fisheries and Wildlife of the Fish and Wildlife Service objected for three reasons: (1) "Lake Worth has been severely damaged by dredging and filling in the past and will be a prime candidate for possible habitat rehabilitation studies in the future. Further filling and destruction of submerged marine bottoms will not be of any benefit to Lake Worth." (2) "The preserve esthetic qualities and to allow for future restoration of the marine biological environment, further unnecessary filling in Lake Worth should be prohibited." (3) Having been advised that Di Vosta had no plans to construct a building on the fill, the bureau felt that the fill project "would be an unnecessary and irretrievable commitment of the marine environment involved and should not be allowed." (Appendix page 77). The Bureau of Outdoor Recreation stated that, "Although this application for permit to fill does not specifically allow the development of appurtenant structures, it is felt that it will nevertheless encourage this kind of development at some future date; should this happen, the existing aesthetic qualities of Lake Worth would be degraded and any attempts to restore the lake to its natural condition would

become increasingly difficult." Also, the Federal Water Quality Administration opposed the project "because it consists of the destruction of a natural shoreline and shallow water areas." (Appendix pp. 78-79). The field representative to the Secretary of the Interior for the Southeast Region transmitted these objections to the District Engineer of the Corps of December 21, 1970, adding that, based on the objections of the three bureaus, the department itself recommended that the permit application be denied. (*Id.*)

In addition to these objections by federal agencies, several objections from private citizens were received, as well as an objection from the Board of County Commissioners of Palm Beach County. In accordance with the policies set forth in a memorandum of understanding between the Secretary of the Interior and the Secretary of the Army promulgated July 13, 1967, (see 33 C.F.R. §209.120(d)(11)), the Corps attempted to mediate the differences between the Department of the Interior and Di Vosta by acting as a conduit for information. It forwarded the objections of the Department of the Interior to the plaintiff, received arguments in support of the permit application from the plaintiff, and forwarded these arguments to the Department of the Interior. This exchange occurred during December, 1970, and January, 1971. In a letter dated February 24, 1971, the Environmental Protection Agency stated that it opposed the application for the following reasons: (1) The lake is a "valuable estuarine area" that "has some signs of degradation" but "is not beyond recovery." Granting of the fill permit "will make that recovery more difficult and protracted." (2) "It is the opinion of the Environmental Protection Agency that the only way in which water quality values and the water use classification of Lake Worth can be preserved is to prevent any further development of land within the

Lake below the mean high water line." (3) The portion of the lake to be filled is without vegetation, but it may be of some value to the marine ecosystem. (4) "The development by Di Vosta Rentals is only a part of an overall encroachment on the shallow water areas of Lake Worth and it is to this overall encroachment that EPA objects."

After receiving plaintiff's written arguments in favor of its application, the Department of the Interior replied that it remained opposed to the project. The field representative to the Secretary for the Southeast Region reiterated his position and added that, having learned that an apartment building was planned for the area, the Bureau of Sport Fisheries and Wildlife concluded that such a project would put a further strain on already heavily overloaded sewerage facilities in the area.

A meeting was held between Di Vosta and a representative of the Bureau of Sport Fisheries and Wildlife in October, 1971, but in January, 1972, the bureau indicated that it was unconvinced that the permit should be granted. It added the following objection: "This Bureau strongly objects to the filling of bay bottoms for residential purposes where there is no demonstrated overall public need, where acceptable alternatives are not considered, and where the proposed works are not water dependent."

We are unable to find fault with the Corps' processing of Di Vosta's application. It was consistent with the applicable regulations, 33 C.F.R. §209.120, and with the three major pieces of legislation which set policy in this area, the National Environmental Policy Act of 1969, 42 U.S.C. §§4331-4347, the Fish and Wildlife Coordination Act of 1934, 16 U.S.C. §§661-666(c), and the Rivers and Harbors Act of 1899. The Corps properly considered environmental factors in making its decision. *Zabel* v. *Tabb*, *supra*. It properly consulted other agencies in making its decision.

U. S. v. *Moretti*, 5th Cir. Slip Opinion No. 71-3137, May 15, 1973. See also *Bankers Life and Casualty Company* v. *Village of North Palm Beach*, 469 F.2d 994 (5 Cir. 1972).

For these reasons, we do not feel that the Secretary's denial of Di Vosta's permit application can be said to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). We have not, in this opinion, reiterated all the evidence in support of Di Vosta's application. Evidence to support a conclusion opposite to that reached by the Secretary was present in the record. But we do not feel that the evidence in opposition was so overwhelming as to make the Secretary's decision unreasonable. Whether or not the objections from other agencies qualify as "substantial evidence," within the meaning of 5 U.S.C. §706(2)(E), they are sufficient to shield the Secretary's decision from attack under §706(2)(A).

Sufficient evidence has been presented to us that, under the provisions of §706(2)(A), the Secretary's order denying the permit was lawful. In such a situation, we see no need to burden the parties with further litigation in the district court. *Bankers Life and Casualty Company* v. *Village of North Palm Beach*, *supra*.

The judgment of the trial court is vacated and the case is remanded to the trial court with directions to dismiss the suit.

VACATED AND REMANDED with directions.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-835-Civ-EC

DI VOSTA RENTALS, INC.,
A Florida corporation,
Plaintiff,

v.

EMMETT C. LEE, JR., Colonel, Corps of Engineers, District Engineer, Department of the Army, Jacksonville, Florida District; STANLEY R. RESOR, Secretary of the Army; and the UNITED STATES OF AMERICA, jointly and severally,
Defendants.

Findings of Fact, Conclusions of Law and Final Judgment

This cause having come before the Court for consideration based upon the briefs of Plaintiff and Defendants, and after consideration of the record in this cause, the Court now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Court has jurisdiction of this cause based upon Title 28, United States Code, Section 1361.

2. The Court also has jurisdiction of this cause based upon Title 28, United States Code Sections 1331 and 2201.

3. This cause arises under the Fifth Amendment of the United States Constitution, and Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1151, Title 33, U.S.C., Section 403.

4. Plaintiff is a corporation that is organized under the laws of the State of Florida.

5. The Defendant, Emmett C. Lee, Jr., Colonel, is the District Engineer of the Corps of Engineers of the Department of the Army's Jacksonville, Florida District.

6. The Defendant Stanley R. Resor is Secretary of the Army.

7. The third Defendant is the United States of America.

8. Plaintiff acquired title to a parcel of real property, fronting and adjacent to Lake Worth in Palm Beach County, Florida, on February 3, 1967. This parcel is hereinafter referred to as the "upland."

9. On September 23, 1963, the City of West Palm Beach, Florida, established a bulkhead line in the waters of Lake Worth, opposite the uplands. This bulkhead line was approved by the Trustees of the Internal Improvement Trust Fund of the State of Florida (hereinafter Trustees) on January 10, 1964.

10. On February 21, 1969, Plaintiff, as an upland owner, paid the Trustees $18,221.00 (Eighteen Thousand, Two Hundred Twenty-One Dollars) for the purchase of .614 acres of land between the upland and the bulkhead line.

11. On September 10, 1969, the Trustees executed and delivered a deed to Plaintiff for the submerged real property. The submerged real property is more particularly described as follows:

> A parcel of sovereignty land in Lake Worth, abutting Section 27, Township 43 South, Range 43 East, Palm Beach County, Florida, being more particularly described as follows:

Commence at the intersection of the easterly right of way line of Flagler Drive with an easterly extension of the North line of Lot 8, Vallowe Court, according to plat recorded in Plat Book 7, page 55 of the Public Records of Palm Beach County, Florida; thence South 88°23'34" East 1.17 feet along said easterly extension of the North line of Lot 8 to a point on the easterly side of an existing concrete seawall and the point of beginning; thence continue South 88°23'34" East 243.71 feet along said easterly extension of the North line of Lot 8 to the established bulkhead line; thence South 11°41'34" West 101.58 feet along said bulkhead line to its intersection with an easterly extension of the south line of said Lot 8; thence North 88°23'34" West 286.98 feet along said easterly extension of the South line of Lot 8 to a point on the easterly side of an existing concrete seawall; thence North 33°01'17" East 117.17 feet, more or less, along said seawall to the Point of Beginning; containing 0.614 acre, more or less.

12. The measurements of the area the Plaintiff in his application to the Department of the Army Corps of Engineers for a fill permit seeks to fill measures approximately 245 feet in length from Flagler Drive due east to the existing bulkhead line adopted by the City of West Palm Beach, and approved by the Trustees, approximately 117 feet southwest along the bulkhead line, and up to an elevation of about 6.5 feet above sea level.

13. Plaintiff applied to the Trustees on September 3, 1969, for a fill permit to fill the above-described submerged lands.

14. On October 21, 1969, the Trustees declined to approve Plaintiff's fill permit application, which the City of West Palm Beach, Florida, had previously approved. (Exhibit 1)

15. Plaintiff then commenced a suit in the Circuit Court in and for Leon County, Florida, seeking to compel the issuance of the requested fill permit.

16. The Circuit Court in and for Leon County, Florida, entered a judgment on May 5, 1970, requiring the Trustees to issue the subject fill permit to Plaintiff. Plaintiff received the fill permit from the Trustees on July 23, 1970. (Exhibits 1 and 2)

17. Before the Trustees had agreed to sell the submerged land to the Plaintiff, the Trustees employed the services of Robert Routa, a marine biologist, to make a biological, or environmental, study of the submerged real property.

18. The marine biologist reported to the Trustees on March 19, 1969, that the Lake Worth area had been adversley affected by previous development work, and that the adjacent parcel to the south had already been filled. He further reported that the bottom of the area of the submerged parcel consisted of sand and silt, and was not vegetated. Finally, he stated that the sale and subsequent development of the submerged parcel should not have significant adverse effects on the area's marine life. (Exhibit 23)

19. There have been no changes in the condition of the submerged property to the present date.

20. On July 31, 1970, the Plaintiff commenced its application process for approval by the Department of the Army Corps of Engineers of a permit for the filling and bulkheading of the submerged real property. (Exhibit 1)

21. The Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife, of the Department of the Interior,

opposes the issuance of the permit for the following stated reasons:

a. Lake Worth has been severely damaged by dredging and filling in the past, and will be a prime candidate for possible habit rehabilitation studies in the future.

b. Further filling and destruction of submerged marine bottoms will not be of any benefit to Lake Worth.

c. The actions by the Trustees and municipal governments in the Lake Worth area indicated overwhelming public opinion is opposed to further dredging, filling, or other forms of environmental abuse in the lake. (This is despite the fact that the City of West Palm Beach had previously approved the Plaintiff's application for a fill permit, and from the record, is the only municipal government to have considered the proposed fill project.)

d. To preserve esthetic qualities, and to allow for future restoration of the marine biological environment, further unnecessary filling in of Lake Worth is to be avoided.

e. The Bureau strongly objects to the filling of bay bottoms for residential purposes where there is no demonstrated public need, where acceptable alternatives are not considered, and where the proposed works are not water-dependent.

f. The filling of bay bottoms, as proposed by the Plaintiff, is considered as a destructive intrusion upon the public aquatic environment.

g. The proposed apartment complex would necessitate an overloading of the inadequate sewage

treatment facility at West Palm Beach, Florida. (Exhibits 17 and 35)

22. The Bureau of Outdoor Recreation opposes any further filling of marine bottoms of Lake Worth in order to allow the natural processes to dominate so as to permit possible habitat reconstruction, and to recreate the aesthetic qualities associated with this environment. (Exhibit 29)

23. The Environmental Protection Agency opposes the issuance of a fill permit to Plaintiff because the Agency objects to the overall encroachment on the shallow water areas of Lake Worth by all dredge and fill projects, although Plaintiff's project is only a part of the overall encroachment. (Exhibit 31)

24. Mr. A. S. Fullerton, then Colonel, Corps of Engineers, District Engineer, Jacksonville, Florida District, recommended on February 2, 1972, that the Plaintiff's permit application be denied because:

a. The proposed project was not water-dependent or believed to be consistent with current public interest in preservation of man's natural environment as enunciated in Public Law 91-190.

b. The Trustees issued a permit only after a court order directing them to issue the permit.

c. The project is opposed by the Department of the Interior and the Environmental Protection Agency. (Exhibit 38)

25. R. P. Tabb, Colonel, Corps of Engineers, Deputy Division Engineer, concurred with Colonel Fullerton's recommendation that the Plaintiff's application be denied on the grounds that:

a. The State of Florida, in fact, opposes granting the permit, and

b. No overriding public interest would be served if the permit were issued. (Exhibit 39)

26. Plaintiff's application for a permit was denied on April 19, 1972, by the Defendant Lee for the following reasons:

a. It is not believed to be consistent with the current public interest in the preservation of man's natural environment as enunciated in Public Law 91-190.

b. It would not involve a water-dependent development.

c. It is opposed by the Department of the Interior and the Environmental Protection Agency, and was approved by the Trustees only after an order from circuit court. (Exhibit 2)

27. The area in question is a catchall for refuse, dead fish, tin cans, and general debris, and is generally an eyesore area. (Exhibit 14 and colored photographs dated September 3, 1972)

28. The City of West Palm Beach, Florida, favors the filling of the submerged lands to eliminate the debris and stagnant water that collects in the area. (Exhibit 23)

29. The Department of Air and Water Pollution Control of the State of Florida has certified that the proposed fill project will not violate applicable water quality standards of the State of Florida. (Exhibits 3 and 23)

30. No unreasonable obstruction to navigation will be caused by the proposed filling. (Exhibit 38)

31. There are at present no reasonable technological bases for reclamation of Lake Worth, and there are no plans at this time to reclaim the lake.

32. The City of West Palm Beach, Florida, has not declared a moratorium on the issuance of building permits because of inadequate sewage treatment facilities, or for any other reason.

33. Little public interest has been shown in the Plaintiff's proposed fill project. (Exhibit 38)

34. Plaintiff commenced this suit on May 25, 1972, against the Defendants, jointly and severally, to petition the court to enter a mandatory injunction requiring the District Engineer and the Secretary of the Army to grant the permit to fill the submerged lands out to the bulkhead line.

CONCLUSIONS OF LAW

1. Under the National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852, 42 U.S.C. Sections 4331-4347, and the Fish and Wildlife Coordination Act, 16 U.S.C. Sections 661-666, the Secretary of the Army may refuse to authorize a dredge and fill project in navigable waters for factually substantial ecological reasons even though the project would not interfere with navigation, flood control, or in the production of power. *Zobel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970).

2. Substantial evidence must be presented to sustain a finding that factually substantial ecological reasons exist to compel the defendant's denial of plaintiff's application for a fill permit.

3. "Substantial evidence", is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion. *National Labor Relations Board* v. *Arkansas Grain Corporation*, 392 F.2d 161 (8th Cir. 1968); *Carter-Wallace, Inc.* v. *Gardner*, 417 F.2d 1086 (4th Cir. 1969), *cert. denied*, 90 S. Ct. 1842 (1970), 398 U.S. 938, 26 L.Ed.2d 271.

4. The conclusions or opinions of an administrative agency or board, or any testimony reflecting directly or indirectly the ultimate views or findings of such agency or board, are generally held to be only the writer's opinion, as distinguished from factual proof. Furthermore, the reports of *ex parte* hearings and investigations are generally excluded because the evidence is improper as well as irrelevant, even if the hearing is before the court sitting without a jury. Such reports are generally considered hearsay with respect to the existence or nonexistence of the applicable ultimate fact. *Universal Airline, Inc.* v. *Eastern Air Lines, Inc.*, 188 F.2d 993, 1000 (DC Cir. 1951), 88 U.S. App. DC 219.

5. Accordingly, the statements contained in the letters from (a) the Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife of the Department of the Interior, (b) the Bureau of Outdoor Recreation, and (c) the Environmental Protection Agency, to the Department of the Army's Corps of Engineers, and the reasons upon which the statements are based in each of those letters, constitute conclusions, as distinguished from factual existence.

6. Therefore, the statements contained in the above-cited letters, and the reasons stated for those statements, do not present factual evidence to support the objections made by the above-mentioned governmental agencies, and in fact, in none of them are any existing factual circumstances depicted. It will be noted that in none of these letters was there an attempt to base an opinion on a

view or other examination of the premises, and the court recognizes that here it is not dealing with a conflict of experts, or indeed what the premises present by way of examination or view, but merely general opinions to the effect that filling of lands generally is detrimental to the environment, which plainly may or may not be true.

7. The Court finds that, upon a thorough consideration of the record, no substantial evidence of ecological detriment to the affected land has been presented that would justify the Defendant Lee's decision to deny Plaintiff's application for a fill permit. The Court further finds, as a matter of law, that credible evidence exists that there would be no such detriment.

8. Accordingly, the Court finds that the decision by the Defendant Lee to deny Plaintiff's application for a fill permit was not based upon factually substantial ecological reasons.

9. The Court takes judicial notice that substantially all of the water areas of Florida have required some slight filling or dredging along their borders, and that without such minor improvements, a real property owner's use of his land would be greatly impaired. Moreover, without such improvements, what are known today as beautiful waterways and sea coasts in the state of Florida, would not exist, except in very restricted areas. Clearly, the public interest is best served in the state of Florida by the improvement and beautification of the state's waterways and sea coast.

10. The Court takes judicial notice of the policies and goals of Congress in enacting the National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852, 42 U.S.C. Sections 4331-4347. These policies and goals were, in part, to:

a. Assure that all American enjoy safe, healthful, productive, and esthetically and culturally pleasing surroundings;

b. Achieve a balance between population and resource use, which will permit high standards of living and a wide sharing of life's amenities; and

c. That each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. Section 4331(b)(2), (b)(5), and (c).

11. The Court takes further notice that the decision of the Defendant Lee in denying Plaintiff's application for a fill permit unreasonably and unjustifiably frustrates this National policy by perpetuating an area that is neither esthetically pleasing nor an enhancement of the environment.

FINAL JUDGMENT

On the basis of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that the Defendants, EMMETT C. LEE, JR., STANLEY R. RESOR, and the UNITED STATES OF AMERICA, shall issue and Plaintiff, DI VOSTA RENTALS, INC., shall be entitled to receive permission and authorization to fill the aforesaid 0.614 acres of bay bottom of Lake Worth, described as follows:

> Approximately 245 feet in length from Flagler Drive due east to the existing bulkhead line adopted by the City of West Plam Beach, and approved by the Trustees, approximately 117 feet southwest along the bulkhead line, and up to an elevation of about 6.5 feet above sea level.

DONE and ORDERED at Miami, Florida, this 16th day of March, 1973.

/s/ Emett C. Choate
Senior United States District Judge

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No. 73-1341

In the Supreme Court of the United States

OCTOBER TERM, 1973

DIVOSTA RENTALS, INC., PETITIONER

v.

EMMETT C. LEE, JR., COLONEL, CORPS OF ENGINEERS; HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A14–A25) is not reported. The opinion of the court of appeals (Pet. App. A2–A13) and the denial of the petition for rehearing (Pet. App. A1) are reported at 488 F.2d 674.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1973. A timely petition for rehearing was denied on December 4, 1973 (Pet. App. A1).

538-718—74——1

The petition for a writ of certiorari was filed on March 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Army, upon the recommendation of the Chief of the Army Corps of Engineers, acted in an arbitrary and capricious manner by denying the petitioner's requested fill permit after receiving objections to its issuance from two agencies of the Department of the Interior, the Environmental Protection Agency, private citizens and the Palm Beach County Board of County Commissioners.

STATUTES INVOLVED

The relevant statutes involved are set forth as an appendix to this brief.

STATEMENT

On September 22, 1970, DiVosta Rentals, Inc., (DiVosta) applied to the Corps of Engineers for authorization to build bulkheads and to fill approximately 0.614 acre of Lake Worth, Florida (App. 7).[1] Although the original application did not specify the purpose of the bulkheading and fill operation, it was later disclosed that DiVosta planned to construct on the fill a multi-story reinforced concrete building (App. 80).

The Corps gave public notice of the request for a dredge and fill permit by DiVosta on October 22, 1970,

[1] "App." refers to the joint appendix filed in the court of appeals.

and received objections to the project from private citizens, the Palm Beach Board of County Commissioners (App. 67, 68, 69, 74, 75), the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior (App. 78–79), and the Environmental Protection Agency (App. 128). Two private citizens submitted letters supporting the grant of the proposed permit (App. 72, 73). The Environmental Protection Agency objected to the project because Lake Worth is a valuable estuarine area that has been subject to continual encroachment and abuse but is not beyond recovery, although further encroachment would make reclamation more difficult (App. 128). The Bureau of Sport Fisheries and Wildlife and the Bureau of Outdoor Recreation expressed similar objections (App. 125–126).

The Corps informed DiVosta of the objections and afforded it an opportunity to present arguments in support of the proposed project (App. 81). An attorney and an engineer representing DiVosta presented arguments and evidence to the District Office of the Corps (App. 83–106). This information was transmitted to the Department of the Interior and on March 4, 1971, the Corps was informed that the Bureau of Outdoor Recreation, the Bureau of Sport Fisheries and Wildlife and the Environmental Protection Agency remained opposed to the grant of the dredge and fill permit (App. 125–128).

On May 13, 1971, the Corps informed DiVosta of the unchanged opposition of the federal agencies and

asked whether DiVosta wished to pursue the application (App. 129). DiVosta informed the Corps that it did and requested further action (App. 130).

On February 2, 1972, the District Engineer recommended denial of the permit (App. 136–139). The Division Office of the Corps concurred (App. 140), and the permit was denied by the Secretary of the Army on March 29, 1972 (App. 141). On April 19, 1972, the District Engineer informed DiVosta that the application was denied, setting forth as reasons the objections of the Department of the Interior and the Environmental Protection Agency and the fact that the Board of Trustees of the Florida Internal Improvement Trust Fund approved this project only because of an order from a Florida circuit court (App. 20).

The petitioner then instituted this action for a mandatory injunction ordering the federal defendants to issue the requested permit. Two pretrial stipulations (App. 40–46, 153–158) delineated the evidence to be considered and stipulated that the case would be decided on that evidence and trial briefs. The district court found that the federal defendants' actions were not based upon factually substantial evidence and ordered issuance of the requested permit. On appeal, the court of appeals reversed. It held that the district court had erroneously utilized the substantial evidence test, rather than determining whether the federal defendants had acted in an arbitrary or capricious manner. Applying the latter standard, the court of appeals, upon its own review of the administrative record, held that the denial of petitioner's

application for a fill permit had not been arbitrary or capricious.

ARGUMENT

1. The court of appeals correctly held that the appropriate standard for review of a decision by the Secretary of the Army, upon the recommendation of the Chief of the Army Corps of Engineers, denying the issuance of a discretionary permit, is whether the Secretary's action was arbitrary or capricious. *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 268; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414–417; *Camp* v. *Pitts*, 411 U.S. 138. See, also, *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Zabel* v. *Tabb*, 430 F. 2d 199 (C.A. 5), certiorari denied, 401 U.S. 910; *Bankers Life & Cas. Co.* v. *Village of No. Palm Beach, Fla.*, 469 F. 2d 994 (C.A. 5), certiorari denied, 411 U.S. 916.

2. Petitioner suggests that the court of appeals decision in *Zabel* v. *Tabb*, *supra*, changed existing law by allowing the denial of a fill permit even though the Secretary of the Army had found that the fill would not interfere with navigation. This Court, however, has consistently upheld the authority of the Secretary to deny dredge and fill permits on nonnavigational grounds. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 101–102; *United States ex rel. Greathouse* v. *Dern*, *supra*; *Greenleaf Lumber Co.* v. *Garrison*, *supra*.

3. Petitioner's unsupported assertion that the opinions and conclusions of other federal, state and local

agencies do not constitute relevant and proper evidence to be considered by the Secretary of the Army and the Corps of Engineers is without merit. It would be anomalous indeed if the Secretary and the Corps, who are required under the provisions of the National Environmental Policy Act and the Fish and Wildlife Coordination Act to solicit views of federal, state and local agencies, were precluded from considering and relying on those views.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1974.

APPENDIX

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. 403, provides:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, provides:

PURPOSE

> SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man

and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Coun-

cil on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the realtionship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany

the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality,

(2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

Section 2 of the Fish and Wildlife Coordination Act of 1934, as amended, 16 U.S.C. 662, provides as follows:

IMPOUNDING, DIVERTING, OR CONTROLLING OF WATERS—CONSULTATIONS BETWEEN AGENCIES

(a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

REPORTS AND RECOMMENDATIONS; CONSIDERATION

(b) In furtherance of such purposes, the reports and recommendations of the Secretary of

the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661–666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

MODIFICATION OF PROJECTS; ACQUISITION OF LANDS

(c) Federal agencies authorized to construct or operate water-control projects are authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 663 of this title, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects: *Provided,* That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interests.

PROJECT COSTS

(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this section shall constitute an integral part of the cost of such projects: *Provided,* That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for

(1) land acquisition, (2) facilities as specifically recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities.

* * * * *

ESTIMATION OF WILDLIFE BENEFITS OR LOSSES

(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) and estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs, if any, to be reimbursed by non-Federal interests.

APPLICABILITY TO PROJECTS

(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been

substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

EXEMPT PROJECTS AND ACTIVITIES

(h) The provisions of sections 661–666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

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